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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 484.

UNITED STATES OF AMERICA,

Petitioner.

vs.

THE COOPER CORPORATION, *et al.*,

Defendants-Respondents.

**MEMORANDUM OF DEFENDANTS-RESPONDENTS
ON PETITION FOR CERTIORARI.**

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**MEMORANDUM OF DEFENDANTS-RESPONDENTS
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This memorandum is addressed to a petition by the Solicitor General, on behalf of the United States, for review on writ of certiorari of a decision by the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York.

The Decisions Below.

The decision of the Circuit Court of Appeals (R. 115-118), of which review is desired, is as yet unreported. The decision of the District Court (R. 102-108) is reported in 31 F. Supp. 848.

The Complaint.

The complaint herein was filed by the Government on February 20, 1939, setting forth certain allegations of fact—not here at issue—to the effect that through the submission of allegedly uniform bids on federal contracts a violation of the Sherman Anti-Trust Act had occurred to the injury of the Government. The complaint concluded with a demand for treble the damages allegedly inflicted by such violation (R. 1, 3 *et seq.*).

The Issue Raised.

This complaint raised a narrow question of statutory construction—which is distinct from and should not be colored by the unproven factual allegations of the complaint as reiterated at length in the Solicitor General's petition.

This question of statutory construction was whether Congress intended to and did give to the Government in the Sherman Act the right to punish the alleged anti-trust violation—not merely by fines, imprisonment, injunctions and forfeitures under Sections 1-6 of the Act—but in addition by punitive assessment under Section 7 of threefold the damages, if any, incurred. The Government had never before in the 50 years of the Act's existence even claimed this punitive right.

No question was raised of merely "making whole" the Government through common law suit for simple damages.

The Issue Decided.

This question of statutory construction raised by the complaint was presented on April 14, 1939, by motion, to the United States District Court for the Southern District of New York (R. 101). The Court held that the Sherman Act did not give to the Government the right to assess punitive treble damages and dismissed the complaint (R. 102-109). The United States Circuit Court of Appeals for the Second Circuit affirmed (R. 115-119).

The lower courts upheld the following analysis of the law as presented by defendants-respondents:

I. *"Person" may sue "Person."*

(a) The Sherman Act authorizes the Government to sue "every person" for fines, imprisonment, injunctions and forfeitures. Sections 1-6.

(b) The Sherman Act authorizes "any person" to sue "any person" for treble damages. Section 7.

(c) It is claimed by the Government that, in addition to the rights of suit authorized in Sections 1-6, the Government is entitled to the right of suit authorized in Section 7.

II. *Government is not a "Person."*

(a) The Government is not "any person" within the meaning of the Sherman Act.

(i) A "person" under Section 7 is one who not only sues but who also is sued. This does not mean a sovereign Government. See *Lopenstein v. Evans*, 69 Fed. 908 (C. C. D. S. C.)

(ii) A "person" under Sections 1-6 is one who is sued by the United States. Again, this does not mean a sovereign Government.

(iii) A "person" in normal usage means natural person. Section 8 by definition expands "person" beyond this normal meaning to include merely corporations organized under the "laws of the United States." Once again, this does not mean a sovereign Government, for the Government is organized under the Constitution as distinguished from the "laws of the United States." By "laws of the United States" is meant Acts of Congress. See *Railroad Co. v. Mississippi*, 102 U. S. 135, 141.

(b) The Government in fact is seldom considered to be a "person" within the meaning of any statute, *United States v. Fox*, 94 U. S. 315—being so considered only where the statutory language necessitates this construction. See *Ohio v. Helvering*, 292 U. S. 360, 370. The language of the Sherman Act, as above analyzed, clearly does not necessitate this construction.

(c) The Government through the Department of Justice has consistently declined to claim that it is a "person" within the meaning of the Sherman Act, during the 50 years of the Act's existence. See *e. g.* Sen. Doc. No. 79, 69th Cong. 1st Sess.

(d) The Government need not be a "person" within the meaning of the Sherman Act, to be protected from anti-trust violation. The Government, when presented with bids to which it reasonably objects, can always reject the bids and (1) negotiate contracts with other sources—as it is here alleged that the Government actually did—or (2) impose the drastic penalties of fines, imprisonment and forfeiture and thereby insure satisfactory bids, or (3) enjoin for all time any repetition of the acts objected to. Indeed, even assuming for the sake of argument that a need exists, it is for Congress

to overturn the 50 years of administrative construction contra the Government being a "person" under the Act. See *United States v. Farrar*, 281 U. S. 624, 634.

III. Government therefore may not sue.

(a) The Sherman Act, therefore, does not authorize the Government—which is not a "person" within the meaning of Section 7—to sue for treble damages.

(b) Congress intended this result, as is indicated by the interpretative statements of the Act's legislative sponsors. See 21 Cong. Rec. 2563-4, 2567, 2641.

(c) Congress having carefully stated in the Act that the Government is to exercise specified rights of suit—for fines, imprisonment, injunctions and forfeitures—the Government is not entitled to exercise additional rights of suit. Sovereign governments as well as individuals may only exercise a right of suit under the Sherman Act where the Act expressly grants to them such right. See *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

(d) While the Government may possibly take advantage of rights under a statute where not named therein, it may not indiscriminately take advantage of rights under a statute that *does* name the Government—allocating some rights to the Government and some to persons. See *Davis v. Pringle*, 268 U. S. 315.

Conclusion.

The defendants-respondents respectfully submit that the District Court and the Circuit Court of Appeals have correctly held that the Government may not sue for punitive treble damages—in addition to other penal and remedial relief—under the Sherman Act.

The defendants-respondents further submit that where, as here, these courts have held in accord with 50 years of departmental practice, it is scarcely necessary for this Court to grant certiorari for review thereof.

The defendants-respondents, however, respectfully defer to the judgment of this Court as to the necessity or lack of necessity for a formal ruling upon the issue involved.

Respectfully submitted,

LUTHER DAY,

Attorney for Defendants-Respondents.

Of Counsel:

ROBERT GUINTHER,

Attorney for Defendants, The Cooper Corporation, The Falls Rubber Co., The Mohawk Rubber Co. of N. Y., Inc. and The Seiberling Rubber Company.

WILLIAM G. PICKREL,

Attorney for Defendant, The Dayton Rubber Manufacturing Company.

LYMAN M. BASS,

Attorney for Defendant, Dunlop Tire and Rubber Corporation.

LUTHER DAY,

Attorney for Defendant, The Firestone Tire and Rubber Co.

PAUL H. ARTHUR,

MORRIS E. DRY,

Attorneys for Defendants, The Fisk Rubber Corporation, United States Rubber Products, Inc. and U. S. Tire Dealers Corporation.

ARTHUR H. DEAN,

JOHN C. BRUTON, JR.,

Attorneys for Defendant, The General Tire and
Rubber Company.

CHARLES WESLEY DUNN,

Attorney for Defendant, The B. F. Goodrich
Company.

HOWARD L. HYDE,

THURLOW M. GORDON,

Attorneys for Defendants, The Goodyear Tire
and Rubber Company, Inc. and The Kelly-
Springfield Tire Co.

PAUL VAN ANDA,

Attorney for Defendant, Lee Tire and Rubber
Co. of N. Y. Inc.

WARREN A. SCHENCK,

Attorney for Defendant, The Norwalk Tire and
Rubber Co.

WILLIAM P. JEFFERY,

JOSEPH F. MURRAY,

Attorneys for Defendant, Pennsylvania Rubber
Company.